TAN CHENG KOOI & ANOR. v. PUBLIC PROSECUTOR

[A.Cr. J. (Chang Min Tat J.) August 4, 1972]

[Penang — Criminal Appeal No. 41 of 1972]

Penal Code, ss. 34, 44, 383 and 385 — Extortion — Common intention — "Injury" — Interpretation of.

Criminal Law and Procedure — Charge — Contents of where offence of extortion committed — General threat of injury — Injury inflicted came within meaning of "injury" in section 44, Penal Code — Essential ingredient supplied — Whether failure to invoke section 34 Penal Code is a fatal omission where more than one person is charged.

Criminal Law and Procedure — First information report — Importance of — Failure to reduce into writing — Effect of non-production at trial — Criminal Procedure Code (S.S. Cap. 21), s. 117.

Evidence — Presumption — When court may presume existence of certain facts — Evidence Act, 1950, s. 114(g).

This was an appeal by the accused against their conviction on a charge of extortion.

The appellants alleged, *inter alia*, that the charged lacked essential particulars, and insofar as the second appellant was concerned, the failure to invoke section 34 of the Penal Code was a fatal omission, and therefore he could not be made responsible for the first appellant's action.

In this case, the first information received was a verbal one, and no written report was made subsequently for production at the trial. In the result, all the evidence against the appellants came entirely from the complainant.

Held, allowing the appeal: (1) where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine his accuser, and which would raise the presumption under section 114(g) of the Evidence Act, 1950 that the report would be unfavourable to the prosecution case. Therefore, in the present case, as the evidence against the appellants came entirely from the complainant, the conviction of the accused cannot be upheld;

(2) where the threat was implied and it was not possible to infer more than a general threat of injury, and particulars of a specific threat could not be given, so long as the injury threatened came within the definition of "injury" in section 44 of the Penal Code, this essential ingredient of the offence of extortion would have been supplied in the charge. Therefore, the threat can be an implied one for the offence to be made out;

(3) the question whether the charge is a proper one must depend on the prosecution case. In this case, as both the appellants had threatened the complainant with injuries for the purpose of committing extortion, they would be properly charged if charged jointly.

Observations on duty of counsel in assisting the court, and the correct scope of section 34 of the Penal Code.

Cases referred to:-

(1) *Beh Tuck Seng* v. *R.* [1947] M.L.J. 197.

(2) *Quek Ching Kim* v. *R.* [1956] M.L.J. 54.

(3) *Lee Swee Tee* v. *Public Prosecutor* [1960] M.L.J. 161.

(4) *Santa Singh* v. *Public Prosecutor* [1938] M.L.J. 58, C.A.

(5) *Mahbub Shah* v. *King Emperor* L.R. 72 I.A. 148.

(6) *Tan Chin Keng* v. *Public Prosecutor* [1964] M.L.J. 316.

(7) *Lim Baba* v. *Public Prosecutor* [1962] M.L.J. 201.

(8) *Ooi Hock Leong* v. *R.* [1955] M.L.J. 229.

(9) *Public Prosecutor* v. *Foong Chee Cheong* [1970] 1 M.L.J. 97.

(10) *Chin Khing Siong* v. *R.* [1952] M.L.J. 74.

(11) *Teo Thin Chan & Anor.* v. *Public Prosecutor* [1957] M.L.J. 184.

MAGISTRATE'S CRIMINAL APPEAL.

Triptipal Singh for the first appellant.

R. Rajasingam for the second appellant.

Azmel bin Haji Ma'amor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an appeal against their conviction by the learned magistrate on a charge of extortion.

The charge read as follows: —

"That you jointly on the 22nd day of April 1970 at about 8.30 p.m. at the Capitol Bar, at Maxwell Road, in the District of Georgetown, in the State of Penang, attempted to put one Chor Swee Choo (m) in fear of injury in order to the committing of extortion and that you thereby committed an offence punishable under Section 385 of the Penal Code."

The brief facts of the case, so far as they were undisputed were these: The appellants had mooted the idea of forming an illicit partnership for the production of pornographic films and had invited the complainant to join in with them. The complainant had toyed with the idea and on one occasion had gone to Alor Star where the appellants resided and which was proposed to be the site of their studio in connection with this proposal. For his taxi-fare back, he was paid $5 by the appellants. Next the appellants came to Penang and called on the complainant at his house. The meeting continued at the Capitol Cinema Bar. At this meeting, whether it was at the house or at the bar, it is not very clear, the complainant finally indicated he would not be participating.

Then, according to the complainant, the first accused demanded $500 but later agreed to reduce the demand to $50. This demand was purportedly for expenses incurred in coming from Kedah. Also, according to the complainant, the first appellant did not appear happy, and he said he would not befriend the complainant anymore. The complainant alleged he then became frightened because he took this to mean a threat.

Complainant had only $30 with him and he said he would go home to fetch the $50 but on his way home, he stopped at the police headquarters where he lodged a report to a Chinese police detective. At the suggestion of the police detective, he returned to the bar. There he told the appellants that he could not get the money, at which in the words of the complainant the appellants were displeased and their faces became black with anger. He was frightened. The appellants then produced a booklet for him to sign. Before he could sign it, the four detectives amongst whom were the Chinese detective to whom he had made the report and a Malay detective whom he had met with the Chinese detective, pounced on the appellants and arrested them.

The complaint would appear to be a verbal one. The evidence as to this came from the Malay detective who explained that he thought the matter too urgent to reduce or have the information reduced into writing. No first information report in writing was thus produced at the trial.

The first ground of complaint against the conviction was that the charge was bad in law, specifically in that the charge lacked essential particulars and insofar as the second appellant was concerned, in that the failure to invoke section 34 of the Penal Code was a fatal omission as he, the second appellant, could not be made responsible for the action of the first appellant.

On this first point of lack of particulars, there is obviously no indication in the charge of the type or nature of the injury said to be threatened. The form of a charge under section 384 in *Ratanlal's* Law of Crimes 20th Edn. at page 991 recommends a description of the injury. The question, of course, is always whether a specific injury was threatened, in which case one would naturally expect the prosecution to describe the threat that was made or whether a general threat of injury was made without anything specific being mentioned. In the latter case, the prosecution could not conceivably be able to describe the injury threatened. In this connection, regard must, I think, be paid to the predilection of the peoples in the East of never calling a spade a spade. But can the offence of extortion never be committed, if the accused, for instance, asked for a loan in words that never went beyond what would normally be for a loan but in such circumstances as would indicate that the repayment was never within the contemplation of the so-called borrower? To my mind therefore, where an actual threat was expressed, then it should of course be expressed in the charge. Where, however, the threat was implied and it was not possible to infer more than a general threat of injury, then it must be realised that the particulars of a specific threat could not be given and so long as the injury threatened came within the definition of "injury" in section 44 of the Penal Code, then this essential ingredient of the offence of extortion would have been supplied in the charge.

Counsel in this case in answer to a question from me were generous enough to admit that if words innocent on their surface were uttered with overtones or implications of an injury, then there would be the use of a threat of injury. There is of course at least one judicial decision which supports this view. In the case of *Beh Tuck Seng* v. *R.*,[1] the appellant who had approached the complainant to collect some $10.80 for expenses and had said "everyone here has joined, what about you?" which the appellant took as a threat that if he refused he would be beaten up and his stall upset, there being no suggestion that the appellant had any business to collect any money from the complainant, was held to have been guilty of the offence of extortion. There are other similar decisions one can find if one takes the trouble of looking them up but fortunately it is not necessary for me to refer to all of them or embark on a review of them even if I have the time or am capable of doing so. It is sufficient for me to say that the weight of these authorities and logic drive me to the conclusion that the threat can be an implied one for the offence to be made out.

Next, on the point whether the failure to incorporate section 34 of the Penal Code into the charges made it bad, I would take this opportunity of posing a question in general without reference to this case, whether there lies on counsel any duty to give every assistance they could to the trial court to assist it in the proper discharge of its functions and to come to a fair decision. If it was not apparent to the defence at the beginning of the trial that the prosecution was relying on common intention, it would have possibly at some stage or other become apparent, if it was so, and was sufficiently clear, for the defence to maintain that the charge in order to be valid must incorporate section 34. This is especially so if there had been several adjournments during which defence counsel could reflect on the evidence. When it became so apparent, would a duty immediately lie on counsel to advise the court? I have myself known responsible counsel taking this course and while I have not the slightest intention of rebuking anyone, I feel obliged to say that no judge and no magistrate can hope to discharge his function as an adjudicating officer reasonably well without the fullest co-operation from the Bar. And I consider the Bench has a right to expect this co-operation. I had on one previous occasion adopted the direction of an Indian High Court judge that it was as much a miscarriage of justice to convict an innocent man as to acquit a guilty person. Another judge has said that there must be justice for the prosecution as for the defence. This must, in my view, mean that counsel if they are to be regarded as they rightly claim to be officers of the court must, while defending their clients to the utmost of their ability, in the final analysis see that if the accused was guilty, he was convicted only in accordance with the penal law and in accordance with the law of evidence and procedure.

In this connection it is, I would suggest, important for both the prosecution and the defence to bear in mind that any amendment of the charge should be made in the court of the first instance. At the appellate stage it might be too late and if the charge was framed so as to disclose no offence known to law, then the conviction could not be sustained: see *Quek Ching Kim* v. *R.*[2] *per* Whyatt C.J. and *Lee Swee Tee* v. *Public Prosecutor*[3] *per* Rigby J. Otherwise, the appellate court would have to consider, on an application of section 448 Criminal Procedure Code whether there had been occasioned such a failure of justice before allowing an appeal merely on the ground of an irregularity in the charge.

But in this case apart from this general remark, it is fortunately for me sufficient merely to note that both learned counsel for the appellants did not seriously pursue this objection and, what is more important, there is no real foundation for this criticism of the charge. As I read the authorities (and I would assure I had read quite a few for the purposes of this appeal), and understood them, where the prosecution is not sure and unable to prove which of the several participants in the action constituting the offence committed the act, as *e.g.* where it is uncertain or impossible to say which of the several persons attacking a person struck the fatal blow which led to all of them appearing on a murder charge, then the prosecution must rely on common intention and must charge all the accused with murder read with section 34: see, *inter*

alia, Santa Singh v. *Public Prosecutor*[4] and *Mahbub Shah* v. *King Emperor*.[5] In *Tan Chin Keng* v. *Public Prosecutor*,[6] Ismail Khan J. (as he then was) held that where the prosecution was relying on common intention, the failure to frame the charge as one read together with section 34 of the Penal Code meant that it had not indicated with sufficient clarity what the prosecution case was. But where several persons committed the offence, and the prosecution could establish this in evidence, then for myself I cannot see the necessity for relying on common intention. If as in this case, both the appellants had threatened the complainant with injuries for the purpose of committing extortion, they would, in my view, be properly charged if charged jointly.

I find support for the view I have taken in another judgment of Ismail Khan J. in the case of *Lim Baba* v. *Public Prosecutor*.[7] There the accused was charged together with another person still at large with the offence of abduction of a girl with intent she might be forced into illicit intercourse The same objection that the charge was defective for failure to incorporate section 34 of the Penal Code was made. The learned judge found that there was evidence on the record that both the appellant and his companion had removed the complainant in a car and shortly afterwards both had sexual intercourse with her and on this evidence held that the charge was correctly framed.

The question whether the charge is a proper one must lie on the prosecution case. It is now necessary to turn to the evidence in this case. In the whole of his examination-in-chief, the complainant had made no mention that the demand came from other than the first appellant. The second appellant had "uttered a few sentences. He talked about the expenses of the journey from Kedah." If the threat or implications of a threat had come only from the first appellant and there was no claim or reliance by the prosecution on common intention, then I should have thought that at the conclusion of the case for the prosecution or at the appeal before me, the proper submission by or for the second appellant would be, not that the charge was defective but that there was no evidence whatsoever implicating the second appellant with the offence that was committed by the first appellant. That submission would be irresistible.

But unfortunately, by a cross-examination that must be regarded as somewhat unhappily over-zealous, the complainant was induced to say at last that the second appellant had also threatened him. This evidence if accepted would appear to establish a *prima facie* case against him, so that it became necessary to attack the charge. But as I have said, the attack was groundless and the appeal on this ground must fail.

There were other grounds against the conviction. They are, with respect, of no real substance. Whether the words uttered were or were not capable of importing a threat as to put the complainant reasonably in fear of injury must depend on the view the trial magistrate took of the evidence and the manner in which it was given. In such matters which depended basically on the credibility of witnesses whom only the trial court had the advantage of seeing and hearing, an appeal court is not in the habit of overruling the trial judge. Also, I do not consider that the complainant was an accomplice. He might be one in the illegal business of shooting pornographic films, if he had joined in with the appellants, but in the offence of extortion, he was the victim and not the accomplice, and no failure of justice was therefore occasioned by the failure of the trial magistrate to warn himself on the evidence of an accomplice. There were indeed several discrepancies in the complainant's evidence but the examples given were all of insignificance and could not be said to have affected his credit. That was the view taken by the learned magistrate and to my mind it is not possible to say that he was wrong.

However in the course of my reviewing the evidence on record for the purpose of coming to a decision in this appeal, I became disquieted by the way in which the prosecution was conducted. As I have earlier indicated, the first information was a verbal one. The detective who received it or rather the detective to whom it was passed, detective corporal Ahmad bin Haji Jusoh, thought the matter required immediate action. Accordingly, he did not wait to record the complaint, but followed the complainant back to the bar and there sprang the trap and caught the appellants. His assessment of the situation might be a correct one and might be sufficient to explain the failure to comply there and then with the requirement in section 117 of the Criminal Procedure Code to reduce the information into writing. But he had however not said one word whether he had subsequently reduced it into writing or why he had not done so. There was of course no reason why he should not have, after the arrest, reduced the first information into writing. Section 117 of the Criminal Procedure Code does not lay down that the recording must be done immediately. It should of course be recorded at the first earliest opportunity and so long as the report did not include anything more than the first information and certainly nothing gathered in the course of police investigation, which would of course be excluded by section 124 of the Criminal Procedure Code, it would, in my view and with respect, be admissible as a first information report. There was however no explanation on the record whether there had been such compliance with section 117 of the Criminal Procedure Code.

Nevertheless the first information report could have been given in the oral form it was made. It should of course have been given by the police officer who received it, in this case, by the Chinese detective and so long as the trial magistrate accepted it, depending on his view of it, there would then have been this report. But not only was the Chinese detective not called but surprisingly he was offered to the defence. Why this was done is beyond my understanding especially as any evidence from the Malay detective corporal who was called would be hearsay, if as was most likely the information presumably given by a Chinese to a Chinese officer would be in a language unknown to the corporal and would have to be translated orally before passing on to the corporal. In the absence of any evidence (and there was none) that the corporal understood the language used by the complainant and the complaint, this must be reasonably

presumed. The corporal did not give evidence of what this first information was about. Perhaps he knew about the hearsay rule or perhaps he did not know what the complaint was about, except that it was serious enough, in his view, for immediate action. But whatever the real reason was, there was no evidence of what was in the first information.

Now the importance of a first information report has been stressed in a number of decisions. It is not a substantive piece of evidence and it is inadmissible for the purpose of proving that the facts stated in it are correct. But it can be used by way of corroboration or contradiction: *per* Carnduff J. in 17 C.W.N. 1213:

"The first information is a document of great importance and in practice it is always and very rightly produced and proved in criminal trials. But it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it."

as cited in *Sohoni's* Code of Criminal Procedure (14th Edn.) at page 275.

Although of great importance, the omission of a first information report does not however appear *per se* to be fatal to the prosecution. In *Ooi Hock Siong* v. *R.*,[8] Spenser-Wilkinson J. (as he then was) while deploring the omission as very serious found on the record evidence other than from the complainant of the offence of the accused and dismissed the appeal against conviction. Gill J. (as he then was) in *Public Prosecutor* v. *Foong Chee Cheong*[9] was of the same mind. He held that the fact that no first information report was made was not itself a ground for throwing out a case. The case of *Ooi Hock Siong* v. *R.*, *supra*, is however distinguishable and was distinguished by the learned judge himself from the earlier case of *Chin Khing Siong* v. *R.*,[10] and it is clear from his explanation that where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report had deprived the accused of an opportunity to cross-examine his accuser and in these circumstances the presumption under section 114(g) of the Evidence Ordinance must be raised that the report would be unfavourable to the prosecution case. This rationale was followed by Smith J. in *Teo Thin Chan & Anor.* v. *Public Prosecutor*[11] where the appeal against conviction was allowed.

In this present case it will be seen that the evidence against the appellants came entirely from the complainant. The decision in *Chin Khing Siong's* case must persuade me that the conviction cannot be upheld.

In this connection, I found further ground for distrust of the conviction in the evidence of the complainant of the events immediately preceding the arrest. If he was to be believed, he had by then clearly indicated to the appellants that he had no intention of joining in the syndicate. He had purportedly gone home to get the extra $20 which added to the $30 he had on his person would enable him to give the $50 demanded. In other words, it was agreed between the complainant and the appellants that the former would not join and the latter would be compensated by a return of expenses, though to the former that was not compensation but extortion. Yet when the complainant returned to the bar with the detectives in tow, after saying to the appellants that he could not get the extra $20, he did not haggle or endeavour to pass the $30 as sufficient, or ask for time to pay. What he did was to take up a pen and pretend to put his signature on a note-book given to him by the appellants which in his own evidence would make him a partner. The incongruity in the complainant's evidence which must go to the root of his credibility as a witness was never resolved at the trial.

In these circumstances, it seems to me that it would be highly unsafe to sustain the conviction.

The conviction is therefore quashed and the sentence of imprisonment set aside.

Appeal allowed.

Solicitors: *Triptipal Singh & Co*: *R. Rajasingam & Co.*